SUPREME COURT, U. S.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1973

NO. 73-1812

HAROLD WILLIS and CHRISTINE MATTHEWS,

Petitioners,

vs.

THE STATE OF CALIFORNIA, Respondent.

PETITIONERS' REPLY BRIEF

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I

Respondent argues, at pages 7 through 12 of the Brief in Opposition to the Petition, that the police did not use active misrepresentation to obtain the entry in the instant case or in Metzger.

The Court of Appeal in each case proceeded on the basis that active misrepresentation was involved. Thus, in Metzger, the court states that the police suggested to the informant that he pose as a potential client (Petition herein, pages 29 through 30). In the instant case, the court acknowledges that "... the officers...used a type of 'deception'...." (Petition herein, pages 26 and 27).

This approach by the Court of Appeal is in accord with the California rule that a supported factual finding in favor of the party who loses a motion is binding on appeal. Please see generally,

People v. Manning, 33 C.A.3d 586, 602-604 (1973).

Respondent seeks to quarrel with the finding of the trial court by pointing to the distinction between expecting Mike to be present and hoping that he would be. While there is a theoretical distinction, the court clearly found that it did not obtain in this case. Rather, the court drew the natural inference that because the police had no reason to think that Mike would be there, they were not really looking for him, particularly in view of the earlier leather belt ruse, the presence of other police waiting nearby, the discrepancies in the description of Mike, and the whole history of the investigation. Obviously, if the trial court had believed that the officers genuinely hoped to find Mike, the term "deception" would be inappropriate.

To avoid this, Respondent suggests that the trial court does not understand what deception is. There is nothing arcane in Respondent's explication of deception, and the suggestion that Respondent knows what deception is, but the trial court does not, is most presumptuous.

II

Respondent also argues that the deception was not the "proximate cause" of the entry. The entry was the intended object of the deception. Where wrongful conduct achieves its intended purpose, there is no room for the doctrine of proximate cause. Please see Restatement of Torts, Section 870 (1939).

Similarly, Respondent's suggestion at page 13 of the Brief in Opposition, that Miss Matthews could have avoided the invasion by checking herself if Mike were there (two round trips up the stairs in

all), puts the shoe on the wrong foot. Respondent cannot justify the deception on the basis that it worked.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be granted.

Dated: August 26, 1974.

Respectfully submitted,

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